proceed without the goods or a part thereof and to forward the goods in whole or in part by any means to or towards the port of discharge at the risk and expense of the goods. It also stipulates that the carrier is not required to, and does not undertake to deliver the goods at the port of discharge or elsewhere at any particular time or to meet any market or in time for any particular use nor does it undertake that the ship or substitute ship will sail or arrive at any stated or scheduled time, and that the carrier shall not be liable for any loss or damage arising or resulting from delayed or early arrival of the goods or any damage or expense incurred by the shipper or consignee because of any change in date or time of sailing or arriving. It also provides that any under or over carriage shall not be considered a deviation nor shall it vitiate any of the terms of the bill. The terms of the bill of lading we have referred to appearing at the top on the reverse side and in clause 9 would therefore appear to be a complete defence to the appellant's claim, and exempt the respondent from any liability for the delay in delivery of the goods.

Mr. Chandran, however, submits that the exception clause in the bill does not exonerate the respondent from liability for the delay in delivery, and relies on *The Ardennes (Owner of Cargo)* v. *The Ardennes (Owners).*[5] That case, however, is wholly distinguishable on its facts and was decided on the basis that evidence was admissible of the contract of carriage which was made before the bill of lading was signed and which contained a different term which was at variance with the clause in the bill enabling the carrier to carry the goods by that or any other ship or railway either belonging to it or to other persons and providing for deviation. Lord Goddard C.J., specifically stated that he had no hesitation in finding on the evidence that there was a promise made to the plaintiff's representative in that case that the ship should proceed direct to London and that he shipped in reliance on that promise, and he held that evidence as to the true contract was admissible where it was made before the bill was signed and it was different from that found in the document or contained some additional term. He found that the representation that the ship would sail direct to London would amount to a warranty, for it was in consequence of that representation that the goods were shipped, both parties being fully aware of its high importance in the circumstances, and that, in other words, it was a promise that the shipowner would not avail himself of a liberty which otherwise would have been open to him. There is no such contract or term in the case before us which would bring it within the ambit of the ratio in *The Ardennes, supra.*

Mr. Chandran, however, contends that the respondent is not exempted from liability because of the peculiar circumstances of the case, and argues that by virtue of the representation made by the respondent in its agents' advice note of December 27, 1973 that the goods in question were due to arrive on the *Priam* on December 25, 1973 and requiring the appellant to arrange to take delivery, the respondent had waived the conditions of the bill of lading. We regret we are unable to follow this line of argument and can find no substance in it whatsoever. The conditions in the bill specifically provide for exemption from liability on the part of the carrier when the goods are shut out and are designed to cover exactly the sort of situation that has arisen in this case. The advice note from the respondent's agents is not a representation which would vitiate the conditions of the bill and the logical extension of any argument on the lines Mr. Chandran propounds would mean that the mere fact that the bill itself speaks of shipment by the *Priam* would be a representation vitiating the conditions on the reverse side of the bill. We reiterate that the bill specifically provides that it is agreed that the receipt, custody, carriage and delivery of the goods are subject to the terms appearing on the face and back of the bill and further that none of the terms of the bill shall be deemed waived by the carrier unless by an express written waiver signed by a duly authorised agent of the carrier.

We accordingly find that as there is no evidence of any other conditions of the contract of carriage which would affect the situation apart from those in the bill of lading itself which is consequently the best evidence of its terms, the provisions in the bill we have referred to afford a complete answer by way of defence to the appellant's claim. We therefore dismissed the appellant's appeal with costs but for wholly different reasons from that of the learned judge, and ordered the deposit in court by way of security to be paid out to the respondent to account of costs.

Appeal dismissed.

Solicitors: *Presgrave & Matthews; Thillaimuthu & Phock Kin.*

BHIKKU DAENG & ANOR. v. MAUNG SHWE TYN & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) April 15 & May 14, 1980]

[Penang — Federal Court Civil Appeal No. 202 of 1979]

Trust — Temple — Trustees to be elected by Burmese and Thai community — Burmese trustee elected by Burmese community — Consent of Attorney-General given — Objection by surviving Thai trustees — Power of court — Costs.

In this case the trust instrument provided that a temple in Penang should be managed by four trustees, two to be elected and appointed by the Burmese community and two to be elected and appointed by the Thai community. A vacancy having arisen in the position of Burmese trustee, a meeting of the Burmese community in Penang was held which elected the second respondent. Consent was given by the Attorney-General for proceedings to be taken for the appointment of the second respondent as trustee. The surviving Thai trustees, the appellants in this case, objected to the appointment of the second respondent and an application was therefore made to court by the first respondent the surviving Burmese Trustee and the second respondent for the appointment of the second respondent as Trustee.

The appellants objected to the appointment on the grounds (a) that the meeting called for the election was called by the Chief Monk who was on a visit pass; (b) that the notice of meeting was published in the National Echo which was not addressed specifically to the Burmese Community in Penang and (c) that the second respondent was not an inhabitant of Penang. The second respondent was an Assistant Superintendant of Police and was of Penang origin. The learned trial judge rejected the objections and approved the appointment of the second respondent. The appellants appealed.

Held: (1) there could not be any valid objection of any substance against the appointment of the second respondent who was duly elected by the Burmese Community of Penang as a trustee to represent its interests in accordance with the terms of the Grant under which the trust was constituted and the appeal must therefore be dismissed;

(2) the appellants had assumed an over-officious and ultra-crepidarian role in things that were no concern of theirs and therefore must bear the costs on appeal and in the court below.

Cases referred to:-

(1) *In re Fountleroy* (1839) 10 Sim. 252; 59 E.R. 610.

(2) *In re Tempest* (1866) L.R. 1 Ch. App. 485.

FEDERAL COURT.

G. Joseph for the appellants.

Tan Phock Kin for the respondents.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The East India Company on behalf of Queen Victoria by a Grant No. 2655 made on May 30, 1845 gave and granted the land specified therein on trust to two Burmese and two Siamese (now Thai, for accuracy of terminology, and we shall so refer) named inhabitants of Penang Island elected and appointed by the Burmese and Thai Community of the Island as trustees for the management of the affairs of their temple (the Thai-Burmese Buddhist Temple at 17 Burmah Lane, Penang) erected thereon to have and to hold the same unto them as such trustees and their successor or successors in the trust without any right or power of disposal of the land so alienated or any part thereof to and in any of them or their successors in the trust to be elected and appointed by the Burmese and Thai Community or any other person or persons whomsoever but which shall remain and continue for the benefit of the Burmese and Thai Community of the Island and its dependencies forever. Succinctly stated, this is the gist of the trust instrument around which the issue in these proceedings as to the appointment of a new trustee revolves. Prior to the institution of process in this matter, the trustees were the appellants representing the Thai community and the 1st respondent and Maung Chan Tun who, however, had died on November 19, 1977 representing the Burmese community, and the application to court in this case involves the appointment of the 2nd respondent as a new Burmese trustee in place of the deceased.

A meeting of the Burmese community was held at the temple on March 19, 1978 at which the 2nd respondent was duly elected as a trustee in place of the deceased trustee. The respondents' solicitors then applied to the Attorney-General for his written consent under section 9 of the Government Proceedings Ordinance, 1956 for the institution of proceedings for the appointment of the 2nd respondent as a trustee of the trust but the Attorney-General in his reply on August 17, 1978 suggested that another meeting be convened strictly confined to the Burmese community in Penang as it would appear this was not done in the case of the meeting in March. Another meeting of the Burmese community was accordingly held at the temple on September 24, 1978 as a result of a notice published for that purpose in the *National Echo* issue of September 21, 1978, and according to the minutes of that meeting at which the 2nd respondent was duly elected as the new trustee representing the Burmese community it was attended only by members of the Burmese community resident in Penang. The Attorney-General then gave his written consent as required by law on October 21, 1978 for the institution of proceedings for the appointment of the 2nd respondent to the trust in place of the deceased trustee.

The respondents' solicitors wrote to the three surviving trustees on November 3, 1978 referring to the election of the 2nd respondent as a trustee by the Burmese community, and requesting them as the surviving trustees to appoint the 2nd respondent as a trustee of the trust under their statutory powers to that effect to obviate the necessity of applying to court. We would digress to point out that all the references in the proceedings in the High Court to the Trustee Ordinance, 1949 are incorrect as the Ordinance was revised and superseded by the Trustee Act, 1949 (Act 208) which came into force on November 15, 1978 and entailed a rearrangement of the sections in the statute. The appellants as the Thai trustees by a letter of November 24, 1978 written through their solicitors objected to the appointment of the 2nd respondent for reasons which were later canvassed in these proceedings and which we will presently have to advert to.

In the circumstances, the 1st respondent as the surviving trustee for the Burmese community and the 2nd respondent, armed with the written consent of the Attorney-General under section 9 of the Government Proceedings Ordinance, had no alternative but to apply to court which they did on December 11, 1978 for the appointment of the 2nd respondent as a trustee under the provisions of section 45 of the Trustee Act and for an order vesting the land in question in him jointly with the three surviving trustees upon the trust contained in the Grant of 1845. Gunn Chit Tuan J., made the orders prayed for and it is against this decision that the appellants appealed. We affirmed the decision of the learned judge except on the question of costs and indicated we would give our reasons in due course and now do so.

It might perhaps be convenient at this stage to briefly refer to and set out the law with regard to the appointment of trustees by the court. The court has a general jurisdiction in regard to the appointment of new trustees where the court considers it expedient to do so. Section 45(1)(a) of the Trustee Act provides that in all cases where it is expedient to appoint a new trustee, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, the court may make an order appointing a new trustee, either in substitution for or in addition to any existing trustee, and whether there is any existing trustee or not at the time of making such order. The general jurisdiction of the court is not affected either by a power in the instrument creating the trust or by the statutory power conferred by section 40 of the Act. In a proper case the court may act notwithstanding these powers (*In Re Fountleroy*[1]). In *In re Tempest*[2] Turner L.J., said that the court in exercising its discretion in appointing a trustee (1) should have regard to the wishes of the settlor if expressed in the

trust instrument or clearly to be collected from it; (2) should not appoint a person with a view to the interests of some of the beneficiaries in opposition to the interests of the others; and (3) should have regard to the question whether the appointment would promote or impede the execution of the trust.

The appellants object to the appointment of the 2nd respondent as a trustee on several grounds. They say that the meeting called for his election was not duly constituted in that it was convened by the Chief Monk of the temple who was here on a social visit pass by a notice published in the *National Echo* which was not addressed to the Burmese community in Penang but to that community at large throughout the country, and further that the 2nd respondent is not an inhabitant of Penang which is a requirement in the Grant constituting the trust. We see no substance whatsoever in these contentions. Someone had to convene the meeting and in the absence of any organisation representing the Burmese community in Penang, and we are told there is none, there would appear to be no impediment to the Chief Monk of the temple doing that; we would think a religious leader would be the appropriate person for that purpose in the context of the trust and the fact that he is or was on a social visit pass is neither here or there in this regard. The notice for the meeting was published in the *National Echo* which, as the learned judge says in his grounds of judgment, has a wide circulation in Penang, and as we have said earlier the minutes of the meeting held on September 24, 1978 clearly show that all the persons present were members of the Burmese community resident in Penang and this therefore met the requirement of the Attorney-General intimated in his letter of August 17, 1978. It is interesting to note that the Attorney-General in this letter refers to a complaint that the meeting of the Thai community held on May 26, 1975 when the 2nd appellant was elected as a trustee to replace a Nai Chuang Sararaks as one of the two Thai trustees consisted of Thais from outside Penang and devotees of Chinese origin, and goes on to say that the summons before the court for his appointment (Originating Summons No. 165 of 1975) was unfortunately not opposed and the issue as to who was entitled to attend and vote at such meetings was not then discussed. The fact that the Attorney-General gave his consent under section 9 of the Government Proceedings Ordinance after the election of the 2nd respondent at the subsequent meeting convened on September 24, 1978 confirms his satisfaction with the manner in which the meeting was held and the election of the 2nd respondent in compliance with his requirement as a pre-condition for his statutory consent for an application to court.

The appellants also complain that the 2nd respondent is not an inhabitant of Penang and that is a necessary qualification for a trustee under the trust. We do not agree this is a necessary requirement under the terms of the trust as contended but, in any event, the point is academic in the context of the election and appointment of the 2nd respondent as he is, in our view, an inhabitant of Penang. There is an affidavit as to his fitness by an advocate and solicitor stating, *inter alia*, that he has known and is well acquainted with the 2nd respondent of No. 41 College Lane, Penang, who is an Assistant Superintendent of Police with the Royal Malaysian Police Force. One does not have to physically reside at all times in a place to be an inhabitant thereof. There is little doubt from the record that the 2nd respondent is of Penang origin, and if he happens to be stationed outside Penang owing to the exigencies of his duties this does not make him any the less an inhabitant of Penang for the purposes of his appointment.

It is also argued on behalf of the appellants that as a police officer the 2nd respondent is precluded from acting as a trustee by the General Orders he is subject to the effect that he cannot function as an executor, administrator or receiver without the express authority of his Head of Department. This argument again is in our view fallacious and wholly devoid of merit as, first, there is no reference in the provision of the General Orders relied on to a police officer functioning as a trustee but only as an executor, administrator or receiver and, second, in any event, if by stretching the form of language and one's imagination as far as it can possibly go a trustee could conceivably be brought within its purview, this would only be a matter of internal discipline in the Police Force and would not affect or vitiate the election and appointment of the 2nd respondent as a trustee. We would add that we are unable to understand or accept the contention of Mr. Joseph for the appellants that 'administrator' in the General Orders referred to would include a person who administers a trust. In any event, in this respect, it was disclosed for the first time in the course of the hearing of this appeal that the whole trust is now under a receivership, that the receiver is carrying out all the management of the trust and the trustees are only concerned with policy matters, and Mr. Joseph concedes that this is indeed the present position. There would therefore appear to be even less cause if there be any at all, and we find none, for raising any objection to the appointment of the 2nd respondent on this line of argument.

We therefore cannot see any valid objection of any substance against the appointment of the 2nd respondent who was duly elected by the Burmese community of Penang as a trustee to represent its interests in accordance with the terms of the Grant under which the trust was constituted. It was certainly a case in the light of the somewhat obdurate and obstructive attitude taken by the Thai trustees, and we should perhaps add relentlessly and persistently pursued and not for the first time either as the record discloses, where it was inexpedient, difficult or impracticable to appoint a new trustee without the assistance of the court, and in the circumstances certainly one that the court could find, as indeed the learned judge did, that it was expedient to appoint one, if for nothing else at least to maintain the parity of trustees representing the interests of the two respective communities in accordance with the provisions of the Grant, and that this was a proper instance for the application of its powers in making an order for the appointment of the 2nd respondent in substitution for the deceased Burmese trustee.

The learned judge quite rightly rejected the several objections taken by the appellants for non-com-

pliance with what counsel appearing for them before him referred to as 'certain formalities' required by the Grant, and which we have already adverted to. The principles enunciated in *In re Tempest, supra,* which we have referred to have been correctly applied and we would add that Turner L.J., in that case made it clear that it would be going too far to say that the court ought to refuse to appoint the proposed trustee merely on an objection raised by the continuing or surviving trustee as this would be to give the latter a veto upon the appointment of the new trustee, and that in such a case it must be the duty of the court to inquire and ascertain the validity of any such objection and to act or refuse to act upon it accordingly. If there was any valid and sustainable objection to the meeting convened for the election of the 2nd respondent or the manner in which he was elected and any other alleged non-compliance with the terms of the Grant or otherwise to his appointment, this should in our view have come, if at all, from one or more members of the Burmese community in Penang as the trustee was elected for appointment to represent the interests of that community. These matters have nothing to do with the Thai trustees and we regret to have to say that in taking the objections and adopting the attitude they did in the matter of the appointment of the 2nd respondent, the appellants assumed an over-officious and ultracrepidarian role in things that were no concern of theirs. *Ne sutor ultra crepidam* — let the cobbler not go beyond his last.

We accordingly dismissed the appeal with costs here and in the court below, both to be borne by the appellants personally on the higher scale and not out of trust funds. The deposit in court by way of security will be paid out to the respondents to account of their costs.

Appeal dismissed.

Solicitors: *Lawrence & Joseph; Thillaimuthu & Phock Kin.*

TAN TOO KIA v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Wan Suleiman & Ibrahim Manan F.JJ.) February 28 & May 16, 1980]

[Kuala Lumpur — Federal Court Criminal Appeal No. 11 of 1979]

Criminal Law and Procedure — Charge of trafficking in raw opium — Confession to police officer — Whether confession voluntary — Trial within a trial — Allegation of assault by police officer — Police officer in court but not called to contradict accused — Language used in interrogation — Accused should understand the language used.

In this case the accused had been found guilty of the offence of trafficking in raw opium and sentenced to life imprisonment. The only evidence against the accused was his confession under caution to the police. After a trial within a trial the learned trial judge held that the confession was voluntary. The accused had alleged that he was assaulted by a number of police officers, including an Inspector. The Inspector was present in court but was not called to contradict the accused. It was also alleged on the appeal that the accused whose mother tongue was Teochew did not understand the Hokkien used to interrogate him.

Held: (1) as the Inspector was specifically identified at the trial within a trial as one of the persons who had assaulted the accused, he should have been called by the prosecution to contradict the accused;

(2) failure by the prosecution to do so should have made the learned trial judge scrutinise with great care the voluntariness of the alleged confession, particularly in a very serious case like this for which the punishment is death or life imprisonment;

(3) generally speaking it is desirable that a suspect be interrogated in a language in which he is at home. What is important is that a person interrogated should understand the language used by the interrogator.

Case referred to:-

(1) *Public Prosecutor* v. *Ibrahim Mastari* — See Appendix.

[The following cases were also cited in argument: *Re Pichi Muthu* [1970] 2 M.L.J. 143; *Chua Beow Huat* v. *Public Prosecutor* [1970] 2 M.L.J. 29; *Director of Public Prosecutions* v. *Ping Lin* [1975] 3 All E.R. 175; *R.* v. *Prager* [1972] 1 All E.R. 1114.]

FEDERAL COURT.

Karpal Singh for the appellant.

Mah Weng Kwai (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): We are of opinion that this appeal should be allowed.

The accused was found guilty of the offence of trafficking in over 33 lbs of raw opium contrary to section 39B(1)(a) of the Dangerous Drugs Ordinance 30 of 1952, and sentenced to life imprisonment. The only evidence against the accused is his confession made under caution to Inspector Ang, PW11, which was considered as voluntary and admitted in evidence by the learned trial judge. Without this confession, there would be no evidence whatsoever against the accused.

Mr. Karpal Singh contended first that the confession was not voluntary and accordingly a trial within a trial was held to decide this issue.

Secondly, he contended that the appellant whose mother tongue was Teochew did not quite understand the language (Hokkien) used by the Inspector.

During the trial within a trial, only Inspector Ang and the accused gave evidence. The accused said in examination-in-chief that he was in the lock-up at Seremban. At about 2.30 p.m. the Inspector took him from the lock-up first to a room where he was assaulted. In that room there were many persons, including Inspector Md. Lias, PW5, who had earlier given evidence in the general trial. Inspector Ang and Inspector Lias had a conversation. Inspector Ang left the room. Then the persons in the room asked him to whom those things (meaning the opium) belonged. The accused said he did not know. They, including Inspector Lias, started hitting him. They punched him on the stomach. The accused was handcuffed; an officer, unidentified, hooked the accused up by the handcuffs on the wall. Others started hitting him on his back and front. He was in that room for more than 30 minutes.

In cross-examination he said that he did not complain about the assault to the police, as he did not know how to make a report.